**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

RAYMOND MODISETT	§	
	§	
V.	§	**A-16-CA-853-LY**
	§	
LORIE DAVIS[1]	§	

**REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE**

TO: THE HONORABLE LEE YEAKEL
         UNITED STATES DISTRICT JUDGE

The Magistrate Judge submits this Report and Recommendation to the District Court pursuant to 28 U.S.C. §636(b) and Rule 1(e) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrates.

Before the Court is Petitioner's Application for Habeas Corpus under 28 U.S.C. § 2254 (Document 1). Petitioner, proceeding pro se, has been granted leave to proceed in forma pauperis. For the reasons set forth below, the undersigned finds that Petitioner's application for writ of habeas corpus should be denied.

STATEMENT OF THE CASE

Petitioner does not challenge his holding conviction out of Ector County. Instead, he challenges disciplinary case 20160244177 in which Petitioner was found guilty of possesion of tattooing paraphernalia. As a result of the disciplinary case, Petitioner lost 45 days of commissary privileges, recreation privileges, and phone privileges. In addition, he had his time-earning

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[1] Lorie Davis, the current Correctional Institutions Division Director, is the proper respondent and will be substituted as such.

classification reduced from L1 to L2. Petitioner did not lose any good time credits. Petitioner

utilized the prison grievance system to challenge the finding of guilt. Both his Step 1 and Step 2

grievances were denied.

DISCUSSION AND ANALYSIS

A.   Punishment

Petitioner's loss of privileges did not trigger the Due Process Clause. In Madison v. Parker,

104 F.3d 765, 768 (5th Cir. 1997), the Fifth Circuit Court of Appeals held that commissary and cell

restrictions as punishment are merely changes in the conditions of a prisoner's confinement and do

not implicate due process concerns. "They are penalties which do not represent the type of atypical,

significant deprivation in which a state might create a liberty interest." Id.

To the extent Petitioner challenges his change in time-earning class these allegations also do

not present grounds for federal habeas corpus relief. The Fifth Circuit has held the timing of a

petitioner's release on mandatory supervision is too speculative to afford him a constitutionally

cognizable claim to the "right" to a particular time-earning status, which right the Texas legislature

has specifically denied creating. Malchi v. Thaler, 211 F.3d 953, 959 (5th Cir. 2000). Similarly, the

loss of the opportunity to earn good-time credits, which might lead to an earlier parole, does not give

rise to a due process claim. Luken v. Scott, 71 F.3d 192, 193 (5th Cir.1995). Texas law does not

create a liberty interest in parole that is protected by the Due Process Clause. Madison, 104 F.3d at

768; Orellana v. Kyle, 65 F.3d 29, 32 (5th Cir.1995).

RECOMMENDATION

It is recommended that Petitioner's application for writ of habeas corpus be denied.

CERTIFICATE OF APPEALABILITY

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c) (1)(A). Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, effective December 1, 2009, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.

A certificate of appealability may issue only if a petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court fully explained the requirement associated with a "substantial showing of the denial of a constitutional right" in Slack v. McDaniel, 529 U.S. 473, 484 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id. "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id.
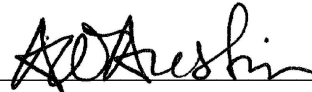
In this case, reasonable jurists could not debate the dismissal or denial of the Petitioner's section 2254 petition on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. Miller-El v. Cockrell, 537 U.S. 322, 327 (2003) (citing Slack, 529 U.S. at 484). Accordingly, it is respectfully recommended that the Court shall not issue a certificate of appealability.

OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing

objections must specifically identify those findings or recommendations to which objections are

being made. The District Court need not consider frivolous, conclusive, or general objections.

Battles v. United States Parole Comm'n, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations

contained in this Report within fourteen (14) days after the party is served with a copy of the Report

shall bar that party from de novo review by the district court of the proposed findings and

recommendations in the Report and, except upon grounds of plain error, shall bar the party from

appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the

district court. See 28 U.S.C. § 636(b)(1)(C); Thomas v. Arn, 474 U.S. 140, 150-153 (1985);

Douglass v. United Servs. Auto. Assoc., 79 F.3d 1415 (5th Cir. 1996)(en banc).

SIGNED this 15th day of July, 2016.

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ANDREW W. AUSTIN
UNITED STATES MAGISTRATE JUDGE